In the Supreme Court of the United States

October Term, 1944

No. 391

RICHARD RICE, PETITIONER,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR THE PETITIONER

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INDEX

CITATIONS

Cases:

CITATIONS (Continued)

Statutes and Miscellaneous:

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OPINION BELOW

This case comes before the Supreme Court of the United States on writ of certiorari to the Supreme Court of the State of Nebraska. The opinion of the Supreme Court of the State of Nebraska appears in —— Neb.[1] ——, 14 N. W. 2d 850.

1 At the time of the printing of this brief the official Nebraska report containing the opinion has not been published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Supreme Court of Nebraska was entered on April 7, 1944 (R. 11). Rehearing was denied June 9, 1944 (R. 16). The petition for writ of certiorari was filed on August 24, 1944, and was granted on October 16, 1944 (R. 17).

The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, being 28 U. S. C. A. Section 344 (b), and paragraph 5(a), Rule 38 of the Rules of the Supreme Court of the United States.

The petitioner contends that his constitutional rights and liberty under the Federal Constitution have been violated by the refusal of the Supreme Court of Nebraska to grant his application for a writ of habeas corpus, particularly the petitioner's right to the protection of his rights and liberties under the Fourteenth Amendment to the Federal Constitution (R. 2, 5).

The petitioner further contends that he is restrained of his liberty and confined to the State Penitentiary in Nebraska as a result of a judgment and sentence imposed by the District Court of Thurston County, Nebraska, for an alleged crime for which, under the circumstances more particularly set forth, he was subject to trial exclusively in a Federal Court (R. 2, 5).

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STATEMENT OF THE CASE

The petitioner filed in the District Court of Lancaster County, Nebraska, on July 30, 1943, his petition for a

writ of habeas corpus. This petition was in the nature of an application, alleging that the petitioner's trial and conviction deprived him of his liberty without due process of law, and praying that a writ of habeas corpus may issue to bring the petitioner before the court forthwith, together with the true cause of his detention, to the end that inquiry might be had in the premises, and that the Court might proceed in a summary way to determine the facts and the legality of the petitioner's imprisonment (R. 1 and 7). The District Court of Lancaster County dismissed this petition and denied the application on August 11, 1943, stating that "no grounds is shown for the issuance of the writ prayed for" (R. 8). The petitioner filed a Motion for New Trial in the District Court of Lancaster County on August 17, 1943 (R. 8, 9). This motion was overruled by the District Court of Lancaster County on August 26, 1943 (R. 10). The petitioner then appealed to the Supreme Court of Nebraska, which entered a judgment on August 7, 1944, finding no error apparent in the record of the proceedings and judgment of the District Court (R. 10).

The application for the writ of habeas corpus set forth the following facts material to the consideration of the questions presented:

> The petitioner is a Winnebago Indian, by birth a resident of Winnebago, Nebraska, a ward of the Federal Government, and is an Indian of the Winnebago Tribe, located in the State of Nebraska (R. 2, 6). On May 22, 1940, an information was filed charging the petitioner and one Joe Bigbear with forcibly entering and breaking into a certain dining hall in

the Village of Winnebago, in Thurston County, Nebraska, which said dining hall, the information charged, is owned by the Winnebago Indian Mission of the Reform Church in America, with the intent to steal property valuse contained in said building (R. 3). It is alleged in the petitioner's application for a writ of habeas corpus that the alleged crime was committed on "indian Reservation Government property" (R. 5).

The petitioner waived preliminary hearing in the County Court of Thurston County, Nebraska, and on October 14, 1940 was brought before the District Court of Thurston County, Nebraska for arraignment upon information filed for burglary (R. 4).

The Journal entry in the District Court of Thurston County, Nebraska with reference to the arraignment and sentence is as follows (R. 4, 5):

> "Defendant having waived preliminary hearing in the County Court and now being brought before the court for arraignment upon the information; this cause came on for hearing upon the information filed herein. The state appearing by said County Attorney and the Defendant appearing in person. The Defendant was thereupon arraigned upon the information filed herein for burglary and after the same was read to him in open court, and he was asked how he pled thereto, to which he replied 'Guilty.'
>
> "The court thereupon read Section 28-538, C. S. 1929, Nebraska, and asked the Defendant if after knowing what penalty would be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court, he replied in the affirmative.

"Whereupon the Defendant was asked if he had anything to say why judgment should not be passed upon him, the Defendant replied that he had nothing to say.

"The statement of the County Attorney was then read.

"The Court thereupon passed judgment and sentence of the court upon the defendant, as follows: It is the judgment and sentence of the Court that you be confined in the penitentiary of the State of Nebraska, at hard labor, no part of which shall be in solitary confinement and Sundays and holidays excepted as to hard labor, for a period of from one (1), to seven (7), years, and pay the costs of prosecution, and that you be committed to the custody of the Sheriff of Thurston County, Nebraska, who will see that you are conveyed to the above institution for execution of this sentence, By the Court: Mark J. Ryan District Judge "Filed October 14, 1940; Moris Rasmussen, Clerk Dist. Court." State of Nebraska, Thurston County) ss. I, Moris Rasmussen Clerk of the District Court of said County, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office. In testimony whereof I have hereunto set my hand and affixed the seal of said court this 9th day of October, 1942, Moris Rasmussen, Clerk of the District Court."

The Trial Court did not advise the petitioner of his constitutional rights to the assistance of counsel and witnesses for his defense, nor did the petitioner waive those constitutional rights either by action or words (R. 5). The entire trial and conviction lasted less than twenty minutes (R. 4). The trial, conviction and commitment were obtained by ordeal and

"mobocrary" (R. 7). The petitioner was deprived of his constitutional right to be informed of the nature and cause of the accusation before being placed on his defense in that he was deprived of the right to be served with a copy of the accusation and was not allowed twenty-four hours within which to examine the charge and prepare a defense (R. 7).

After the petitioner had been confined in the penitentiary for a year and a half he was informed that his remedy was to file a writ of error coram nobis which was dismissed for want of prosecution by counsel to whom petitioner's sister had paid a fee of $75.00 (R. 6).

The petitioner is thirty years of age (R. 6). He is ignorant of the "sience" of law, has never "studdied" law, and has had no one to champion his cause of action only the assistance of a fellow inmate (R. 6).

Although he had served ten months of a previous sentence of one year in the Men's Reformatory at Hawthorne, having been discharged in 1936, he was sentenced to an indeterminate sentence, contrary to the provisions of the Nebraska statute making an indeterminate sentence applicable only in cases of persons not previously confined in any penitentiary (R. 3).

In his motion for a new trial in the District Court of Lancaster County from the judgment of the Court denying his application for a writ of habeas corpus, the

petitioner prayed for the assistance of counsel, but none was accorded him (R. 9).

There is no showing in the record of any answer or objections of any sort filed in response to the petitioner's petition and application for a writ of habeas corpus in the District Court of Lancaster County, Nebraska. The Supreme Court of Nebraska answered the contention by stating in its opinion that a waiver of the constitutional right of the assistance of counsel will be implied where an accused, being without counsel, fails to demand that counsel be assigned him, particularly where an accused voluntarily pleads guilty (R. 14). And the Supreme Court of Nebraska answered the contention of the petitioner that he was subject to trial and conviction for the alleged crime exclusively in the jurisdiction of federal courts by stating that the Federal Penal Code provides generally that all Indians committing a crime, either within or without an Indian Reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons (R. 13 and 14).

SPECIFICATION OF ERRORS

1. The petitioner is deprived of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment in that he was not afforded any opportunity to have the assistance of counsel.

2. The petitioner is deprived of his liberty without due process of law, contrary to the provisions of the

Fourteenth Amendment, in that he did not waive his right to the assistance of counsel by pleading guilty, nor by any intelligent or intentional failure to request the assistance of counsel.

3. The petitioner, an Indian, was convicted and tried in a state court, and is now confined in a state penitentiary under a sentence imposed by a state court for a crime for which he was subject to trial and penalty only in a federal court.

SUMMARY OF ARGUMENT

The right to the assistance of counsel is one of the most fundamental human rights protected under the Fourteenth Amendment of the Constitution of the United States. At least under certain circumstances this fundamental right is protected under the Fourteenth Amendment from violation in proceedings in state courts. The conditions whereby this Indian petitioner was sentenced for one to seven years at hard labor in the penitentiary of the State of Nebraska, in a summary proceeding lasting less than twenty minutes, present circumstances so contrary to natural, inherent, and fundamental principles and fairness as to amount to a violation of due process of law under the Fourteenth Amendment. Nor was there any waiver of the right to assistance of counsel by reason of the petitioner having plead g.. lty, and there is no evidence or even suggestion in the record to show that there was any intelligent or intentional waiver of the right of the petitioner to the assistance of counsel.

A further reason for granting the application for the writ of habeas corpus is that the application alleges facts the proof of which would establish that the petitioner was in fact subject to trial and penalty for the alleged crime exclusively in the jurisdiction of the United States under the provisions of Section 328 of the Criminal Code of the United States (Title 18 U. S. C. A. Section 548) with reference to the trial of Indians for crimes.

ARGUMENT

I.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE HE WAS NOT PROVIDED WITH THE ASSISTANCE OF COUNSEL.

In his application for a writ of habeas corpus, the allegations of which remain uncontroverted in the record, the petitioner alleged that he was an Indian of the Winnebago Tribe located in Thurston County, Nebraska, was ignorant of the "...ience" of law, had never "studdied" law, and had no one to champion his cause of action except the assistance of a fellow inmate. The application for the writ alleged as follows:

> "Upon the arraignment the record bespeaks the truth that the Trial Court did not advise your petitioner of his Constitutional rights to the assistance of Counsel and witnesses for his defense; nor the right to be charged and informed of the nature and cause of the accusation by indictment or presentment of a Grand Jury guaranteed by the Fourteenth, Fifth and Sixth Amendments to the Constitution of

of the United States; nor the right to trial by jury guaranteed by Art. I, Sec. 6; Nebr. Const.; nor did your petitioner herein waive those constitutional rights either by action or words."

Other circumstances with reference to the conviction and incarceration of the petitioner which are alleged in his application for the writ of habeas corpus are set forth in greater detail below, in connection with the discussion of the cases and the law with respect to the right of an accused to be provided with the assistance of counsel.

The petitioner respectfully urges that his conviction without the assistance of counsel deprived him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United Sttaes, particularly in view of the circumstances existing in this case.

THE RIGHT TO ASSISTANCE OF COUNSEL AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—GENERALLY.

The fundamental character of the right to the assistance of counsel in a criminal proceeding in a state court, as a right included in the conception of the due process clause of the Fourteenth Amendment was carefully analyzed in *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527, where this Court said, the opinion quoting in part from the opinion in *Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. ed. 97, 106:

"'It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago B & Q R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979. If this is so, it is

not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, make it clear that the right to the aid of counsel is of this fundamental character."

In *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682, this Court in reviewing a judgment of the Supreme Court of the state of Mississippi affirming a conviction of crime had occasion to consider the limitations upon the regulation by a state of the procedure of its courts resulting from the requirements of the "due process of law" clause of the Fourteenth Amendment. Recognizing that a state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, within certain limitations, it is pointed out in the opinion in that case that the freedom of a state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. This Court in that opinion made a distinction between matters which a state is free to regulate in accordance with its own conception of policy, and those rights and privileges which, in the language of this opinion, "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." And referring specifically to the right of an accused to the assistance of counsel, it was stated in *Brown v. Mississippi*, *supra*, that:

> "The state may not deny to the accused the aid of counsel."

In *Avery v. Alabama*, 308 U. S. 444, 84 L. ed. 377, a case coming before this Court on review of a judgment of the Supreme Court of Alabama affirming a conviction in a Circuit Court of that state, the question presented was whether there had been a violation of the accused's rights under the Fourteenth Amendment. In that case counsel had in fact been appointed, but the question of the right of an accused resulted in connection with a contention with respect to the opportunity for appointed counsel to confer with the accused and adequately prepare his defense. In discussing this question this Court said in *Avery v. Alabama, supra:*

> "Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guaranty of assistance of counsel would have required reversal of his conviction."

This Court has in many cases held that certain of the rights protected against national action by the first eight amendments to the Constitution are equally protected against state action under the due process of law clause of the Fourteenth Amendment. The more fundamental and the more deep rooted in the traditions and principles of justice and liberty is the right, the more certain it is to be a right safeguarded against state action by the due process of law clause of the Fourteenth Amendment. In *Johnson v. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, this Court, in a case involving the right to the assistance of counsel under the Sixth Amendment to the Constitution, in a case coming before this Court from the Northern District of Georgia which dismissed a petition for a writ of habeas corpus on behalf of a petitioner who had been convicted in a United States District Court, emphasized

the fundamental character of the right of such assistance, in the following language:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intrinsic, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '. . . the humane policy of the modern criminal law . . .' which now provides that a defendant '. . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state.' "

The untrained layman is just as lacking in the professional skill and knowledge necessary to prepare his defense in a state court as in a federal court. The guiding hand of counsel at every step in the proceedings is just as necessary to one on trial for a crime in a state court as in a federal court. The procedure to such a layman certainly may appear to be as intricate, complex and mysterious, if not more so, in a state court as in a federal court. The deprivation of life or liberty is just as conclusive and real to the accused whether the death penalty is imposed by a federal or a state court, or whether the accused is restrained in a federal or a state penitentiary. It is the protection of that life and liberty in accordance with the traditionally recognized fundamental principles of justice which is safeguarded by the requirements of the due process of law clause of the Fourteenth

Amendment. And it is because the right to assistance of counsel has been traditionally recognized as one of the most fundamental of such human rights that the freedom of a state establishing its policy is necessarily limited in this respect by the constitutional guarantees of the Fourteenth Amendment.

THE RIGHT TO ASSISTANCE OF COUNSEL AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—UNDER CERTAIN CIRCUMSTANCES.

In spite of the statements quoted above indicating that the right of an accused to the assistance of counsel in state courts is as fully protected by the due process clause of the Fourteenth Amendment as is the right of an accused to such assistance in federal courts under the Sixth Amendment, it is true that the opinion in *Powell v. Alabama, supra,* confined the holding in that case to the particular facts. And it is recognized that the phrase "due process of law" in the Fourteenth Amendment has been said by this Court "to formulate a concept less rigid and more fluid"[2] than the concept of that identical phrase in the Fifth Amendment. It is suggested in *Betts v. Brady,* 316 U. S. 455, 86 L. ed. 1595, that the particular facts in each case must be appraised. Before, however, proceeding to appraise the facts in the instant case, the distinction should be emphasized that while in *Betts v. Brady, supra,* the matter came before this Court on appeal from a judgment granting a writ of habeas corpus, but denying the relief prayed, the instant case comes before the Court on appeal from refusal to grant the writ because of the insufficiency of the

2 *Betts v. Brady,* 316 U. S. 455, 86 L. ed. 1595.

allegations of the application. No pleading of any kind was filed in response to the petitioner's application for a writ. Although this petitioner's allegations are undenied, he has had no chance to prove them. At the present stage of the proceeding in the instant case, unlike the accused in *Betts v. Brady, supra,* the petitioner does not necessarily ask this Court to apply a rule in the enforcement of the Fourteenth Amendment. The petitioner here is seeking the reversal of a judgment of the Supreme Court of Nebraska, and that a writ of habeas corpus may issue, in order that his fundamental rights may be protected.

The petitioner in the instant case, in his duly verified petition, alleges among the allegations thereof, the following:

> 1. That he is ignorant of the "sience" of law, has never "studdied" law, and has no one to champion his cause of action except the assistance of a fellow inmate (R. 6).
>
> 2. That his conviction and commitment are based on a swift, reckless sham and pretense of a trial (R. 2); that his trial, conviction, and commitment were obtained by ordeal and "mobocrary" (R. 7); that the proceeding by which he was tried and convicted consumed less than twenty minutes (R. 4); that he was not served with a copy of the accusation, nor allowed even 24 hours to examine the charge and prepare a defense (R. 7).
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> 3. That the trial court did not advise the petitioner as to his constitutional rights to assistance of counsel and witnesses for his defense, nor to his right to trial by jury, and that he did not waive his constitutional rights either by action or words (R. 5).

4. That he is by birth an Indian of the Winnebago Tribe (R. 2 and R. 6), a resident of Winnebago, Nebraska, and a ward of the Federal Government (R. 2); that the alleged crime was committed on an "indian Reservation Government property" (R. 5); that if competent counsel had been assigned, he would have been able to convince the court that no jurisdiction rested in the Trial Court (R. 6 and R. 7).

Further indication of the hasty manner in which the petitioner was tried and sentenced is shown by the apparent lack of any inquiry as to the petitioner's previous record. Having already served a previous sentence (R. 2, 3), he was not subject to an indeterminate sentence such as was in fact imposed. The previous sentence had in fact been imposed in the District Court of Thurston County, Nebraska, on the information of the County Attorney thereof, but in spite of this fact, an indeterminate sentence was imposed by the Trial Court, which the Supreme Court suggests in its opinion was "either through inadvertence or misapprehension" (R. 15). There is no suggestion in the record that the petitioner ever claimed or had occasion to claim that the crime in the instant case was his first offense.

The circumstance that this petitioner alleges that he is an Indian of the Winnebago Tribe, a Ward of the Federal Government, and that his alleged crime was committed on an "indian Reservation Government property" deserves special comment.

The obligation with respect to the protection of Indians in their fundamental rights under the white man's law lends special force and significance to the right of assistance of counsel when the accused is an Indian.

Those rights which are recognized as existing under the "natural, inherent and fundamental principles of fairness" as "found in the common understanding of those who have lived under the Anglo-American system of law"[3] should be safeguarded with special concern when the accused is an Indian brought to trial in the courts of the white man. It has frequently been said that Indians are wards of the Government. Thus in *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, it was stated:

> "These Indian Tribes *are* wards of the nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen. * * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes."

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3 This language is from *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595

The further circumstance that the petition alleges that the crime was committed on "indian Reservation Government property" emphasizes the importance of assistance of counsel. Complicated and somewhat technical jurisdictional questions necessarily result from the state of the law with respect to jurisdiction of criminal offenses alleged to have been committed by Indians. In the next portion of this brief there is more specific argument with respect to the question of jurisdiction over Indians in criminal cases. In the opinion of the Supreme Court of Nebraska in the instant case, it is stated that "the federal Penal Code provides generally that all Indians committing a crime either within or without an Indian Reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons" (R. 13, 14). The argument in the next portion of this brief will show that the question of jurisdiction over Indians committing criminal offenses may not be answered in such general terms as suggested in the opinion of the Supreme Court of Nebraska. And this very fact, that the eminent Supreme Court of Nebraska has apparently concluded in this case that the federal Penal Code makes no distinction between Indians and other persons committing crimes within the boundaries of a state, in and of itself forcefully illustrates that the need for the aid of counsel is especially inherent in the case of Indians.

As this Court has stated in *United States v. Kagama, supra:*

> "The relation of the Indian Tribes living within the boundaries of the United States, both before and since the Revolution, to the people of the United

States has always been an anomalous one and of complex character."

THE RIGHT TO ASSISTANCE OF COUNSEL—UNDER NEBRASKA LAW.

It is suggested in *Betts v. Brady*, supra, that the constitutional, legislative and judicial history of the states constitutes an authoritative source of the common understanding of those who have lived under the Anglo-American system of law, as to the extent to which due process of law demands that an indigent defendant in a criminal case be furnished counsel. The provisions of the Constitution and statutes of Nebraska on this subject matter, and the interpretation thereof by the Supreme Court of Nebraska afford some criterion of the extent to which the defendant in the instant case was denied due process of law. When it appears that in other Nebraska cases counsel has been provided, it is exceedingly difficult to reconcile the failure to provide counsel in the instant case with common and fundamental ideas of fairness and right, particularly when an appraisal of the circumstances in the instant case seems to suggest the special desirability of providing counsel.

The Constitution of Nebraska provides in Article I, Section 3:

> "No person shall be deprived of life, liberty or property, without due process of law."

The Constitution of Nebraska provides in Article I, Section 11:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by

counsel, to demand the nature and cause of accusation, and to have a copy thereof; * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

And in Article I, Section 8, the Constitution of Nebraska provides:

"The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."

Section 29-1803 of the 1941 Cumulative Supplement to the 1929 Compiled Statutes of Nebraska provides that:

"The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours * * * ."

The statutory provision last above quoted appears in Section 29-1803 of the 1929 Compiled Statutes of Nebraska.[4] It appeared as part of Section 437 of Chapter XLII of the General Statutes of Nebraska of 1873. From time to time there have been amendments to this section which amendments have made provision with respect to the manner of allowance of claims for payment by the

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[4] The provision above quoted appears as part of Section 29-1803 of the Revised Statutes of Nebraska, 1943, printed by authority of the legislature of Nebraska by an enactment of the legislature in 1943, a four-volume revision being distributed to the lawyers of Nebraska as this brief is prepared in December, 1944. As of the time of the sentencing of the petitioner in the instant case, on October 14, 1940, the correct citation of the statutory provision above quoted in Section 29-1803 of the 1939 Cumulative Supplement to the Compiled Statutes of Nebraska for 1929.

County for the services of such appointed counsel, and for a public defender in more populous counties;[5] but the provision for requiring the appointment of counsel for any person indicted for a capital offense or an offense punishable by imprisonment in the penitentiary has remained unchanged in the statutory law of Nebraska for more than seventy years.

The Supreme Court of Nebraska has consistently recognized the right of an accused to the appointment of counsel under the statutory provision above quoted.

In *Smythe v. State*, 124 Neb. 267, 246 N. W. 461, the question was presented in a case in which the accused had rejected offers by the court to appoint counsel. Finding that the accused was competent at the time he voluntarily refused the aid of counsel, the Supreme Court of Nebraska used the following language, clearly indicating that the right to the aid of counsel exists unless voluntarily waived:

> "The right of a defense in a prosecution for a felony includes the right of accused to be represented by an attorney, but defendant refused offers therefor and conducted his own defense without counsel from the beginning of the trial until the jury rendered a verdict of guilty. The right to have an attorney was granted by statute and it was the duty of the trial court to appoint one for defendant at public expense, if he was unable to procure one of his own choosing. Comp. St. 1929, Sec. 29-1803, as amended by Laws, 1931, c. 65 Sec. 6. The right to a trial is a fundamental one, but accused may waive

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[5] The latest such amendment was in 1931 (1931 Session Laws of Nebraska, p. 179).

it and plead guilty.[6] He may likewise waive the right to counsel, if competent to do so. At the arraignment defendant rejected an offer of the trial court to provide counsel and the offer was repeated and rejected at the beginning of the trial. The record does not show that defendant, before and at the trial, was unable to select and procure the services of an attorney. It is well-settled law that the trial may proceed in absence of counsel for a mentally competent defendant who declined the court's offer therefor. It was not a peremptory duty of the court to force counsel upon him against his will. 16 C. J. 823. The evidence shows he was competent to refuse the aid of counsel when offered. * * * The record fails to show that defendant did not have time to prepare for trial after available counsel had been refused."

In *Bordeau v. State*, 125 Neb. 133, 249 N. W. 291, a defendant pleaded guilty to an information charging murder in the second degree, and later brought error to the Supreme Court of Nebraska to review a judgment denying a motion to vacate the former judgment and for leave to withdraw his plea of guilty and enter a plea of not guilty. In affirming the judgment the Supreme Court of Nebraska used the following language, indicative of the extent to which provision for assistance of counsel has been recognized in other cases in Nebraska:

"The evidence shows that on the night of October 16, 1930, defendant was questioned by the county attorney and made answers in writing, after having been fully advised as to his immunity. On the morning of October 17, 1930, he was taken to the county court for his preliminary hearing. He was offered

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6 The effect of a guilty plea as a waiver is discussed in the next portion of the argument, immediately following the citation of Nebraska cases.

an opportunity to consult counsel, and was informed that he would be furnished counsel if he so desired. He asked if he might act as his own attorney and did so. He was bound over to the district court. He immediately requested the county atorney to explain to him the different degrees of homicide, which was done. He offered to plead guilty to manslaughter, if the county attorney would charge that offense. The county attorney refused on the ground that he thought the facts indicated at least second degree murder. Later that day defendant told the county attorney he would plead guilty to murder in the second degree, if so charged. When he was so charged and was brought before the district court to be arraigned, the court very carefully and methodically explained to him his right to have counsel (either of his own or appointed by the court) and all other rights afforded him by law, including the nature of the charge and the penalties. He told the court he had not been influenced by promises or coercion or in any other manner in reaching this decision to plead guilty. Upon acceptance of such a plea, the court told defendant he could have anyone he desired talk to the court and that a full investigation would be made before sentence. Defendant was unusually well advised of and protected as to his legal rights. He was competent to refuse and did refuse counsel."

The record of the proceeding lasting less than twenty minutes in which the Indian petitioner was arraigned and sentenced in the instant case, and during the course of which there was no mention of counsel, casts grave doubt as to whether the petitioner was convicted by a proceeding conducted in accordance with fundamental principles of justice and fairness, when compared with the record set forth in the quotation above.

Again, in *Stagemeyer v. State,* 133 Neb. 9, 273 N. W. 824, the Supreme Court of Nebraska, after referring to the provisions of the Nebraska constitution providing for and defining the rights of an accused in criminal prosecutions, said:

> "Without an extended discussion of these paragraphs, it may be said that the right of the accused to counsel and due preparation for his trial cannot be gainsaid."

The opinions quoted above from Nebraska cases were rendered within a period of seven years immediately preceding the arraignment and sentence of the Indian petitioner in the instant case. In view of these unqualified expressions of the right of an accused to the assistance of counsel, it is difficult to understand how the petitioner in the instant case can be said to have been accorded due process of law in accordance with fundamental principles of fairness and justice as commonly understood in the system of law under which justice is administered among white men in Nebraska.

THE RIGHT TO THE ASSISTANCE OF COUNSEL IS ONLY WAIVED BY AN INTELLIGENT AND COMPETENT WAIVER.

The answer of the Supreme Court of Nebraska to the contention of the petitioner, that he was deprived of due process of law, under both the Constitution of the United States and the Constitution of Nebraska, because he was not provided with the assistance of counsel, is that a waiver of this right will be implied where an accused who is without counsel fails to demand that counsel be assigned to him, particularly when the accused pleads guilty. (R. 14).

It becomes very pertinent, therefore, to consider the effect of failure by an accused to demand counsel and the plea of guilty upon his right to have assistance of counsel.

The right to the assistance of counsel being a fundamental constitutional right, courts should indulge every reasonable presumption against the waiver of that right. As this Court said in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 307, 81 L. ed. 1093, 1103:

> "We do not presume acquiescence in the loss of fundamental rights."[7]

It is proper and necessary that there should not be any presumption that the right to assistance of counsel has been waived, for an accused may be entirely ignorant of his right to demand such assistance. The very existence of the right, the same sense of fairness and justice which prompts the provisions whereby an accused may have the assistance of counsel, of necessity imposes a responsibility to make certain that the accused knows of that right. Otherwise there can be no intelligent waiver of it.

These principles were set forth in *Johnson v. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, 146 A. L. R. 357, a case of which the commentator in American Law Reports states: "This case has had great influence in the law of habeas

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[7] There are, of course, numerous additional authorities to the same effect: *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 81 L. ed. 1177; *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169; *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879; *Patton v. United States*, 281 U. S. 276, 74 L. ed. 854 *Dimick v. Schiedt*, 293 U. S. 474, 79 L. ed. 603.

corpus." In this case the following language is especially pertinent:

> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. * * *
>
> "The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty."

In the case of *Walker v. Johnston*, 312 U. S. 275, 85 L. ed. 830, a case in which the accused had pleaded guilty, there were conflicting affidavits as to whether or not the accused had stated in open court that he did not desire counsel. In remanding the case for further proceedings and evidence this Court said:

> "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the

prosecution into entering a guilty plea, he was deprived of a constitutional right."

In the case of *Evans v. Rives*, 126 Fed. 2nd 633, it was contended by counsel opposing issuance of a writ of habeas corpus, in the United States Court of Appeals for the District of Columbia, that the opinion in *Johnson v. Zerbst, supra,* did not apply to convictions upon guilty pleas. This contention was answered by reasoning which is most appropriate in the instant case, in answer to the contention that the petitioner in the instant case waived his right to the assistance of counsel by pleading guilty:

> "It is, however, contended by the District of Columbia that Johnson v. Zerbst does not apply to convictions upon pleas of guilty but only in the case of pleas of not guilty and trial and conviction thereon, and that therefore it does not govern in the instant case. *A priori,* there would seem to be no proper basis for such a distinction. Loss of life or liberty is as certain through sentence upon a plea of guilty as through sentence upon the verdict of a jury. The importance to an accused of the assistance of counsel in the event of a plea of not guilty and trial is patent. It is equally important to an accused, in determining in what manner he may properly meet a charge and before a decision as to the nature of his plea, to have the advice of counsel concerning, for example, the sufficiency of the indictment, the possible existence of a defense or bar under facts known to the accused but the legal import of which he may not know, the nature of the penalty provided for the offense charged, and the probable extent to which it will be imposed, under the facts involved, in the event of a plea of guilty. But the point raised by the District need not be determined upon *a priori* basis. The Supreme Court in Walker v. John-

ston, 1941, 312 U. S. 275, 61 S. Ct. 574, 85 L. ed. 830, has negatived any possible support for the contention that the constitutional guaranty of the assistance of counsel in a criminal case is not applicable where there is a plea of guilty."

The circumstance of the guilty plea should not operate as a waiver of the right to assistance of counsel by reason of any contention that even though counsel had been appointed no other plea might properly have been made. As a matter of fact, totally apart from any question of guilt or innocence, had counsel been appointed for the accused in the instant case, his services in maintaining that the accused was subject to trial only in a federal court might well have been much more than perfunctory. Further, as pointed out in *Evans v. Rives, supra,* the scope of review on habeas corpus is limited to an examination of the jurisdiction of the court whose judgment of conviction is challenged.[8] And there is the further answer to the possible contention that the petitioner was not seriously prejudiced by lack of counsel that speculation in this regard is not consistent with the fundamental nature of the right to assistance of counsel. As stated in *Glasser v. United States,* 315 U. S. 60, 86 L. ed. 680:

> "The right to have the assistance of counsel is too fundamental and absolute to indulge in mere calculations as to the amount of prejudice arising from its denial."

See also, *Ex Parte Richard Quirin,* 317 U. S. 1, 87 L. ed. 3.

8 There is cited in *Evans v. Rives,* 126 Fed. 2nd 633, in support of this proposition the case of *Bowen v. Johnston,* 306 U. S. 19, 83 L. Ed. 455, in which the same proposition is set forth with numerous cases cited in support thereof.

In this connection it may be appropriate again to refer to the record in the instant case. It must be remembered that the application for the writ of habeas corpus was prepared by a petitioner who had no one to champion his cause "only the assistance of a fellow inmate" (R. 6). In his motion for a new trial in the District Court of Lancaster County, the petitioner asked that assistance of counsel be granted him (R. 9). The application does unequivocally allege that the trial court did not advise the accused of his right to the assistance of counsel, and that the accused did not either by action or words waive his constitutional rights (R. 5). The record of the arraignment and judgment in Thurston County, Nebraska, is entirely silent on the matter of appointment of counsel (R. 4). The Supreme Court of Nebraska considered that there was a waiver of the right to assistance of counsel by reason of the guilty plea, and failure to demand counsel (R. 14).

Granting that "the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused"[9] the record in the instant case is wholly lacking in any indication of an intelligent waiver. There is nothing in the record to suggest that the accused waived his right to the assistance of counsel "with full knowledge of his rights and capacity to understand them."[10] The issue as

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9 This language is from *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 461, discussed in detail, *supra*.

10 This language is from *United States* v. *Adams*, —— U. S. ——, 88 L. ed. 16 (Adv. Op.).

raised is rather that the accused did not so waive his rights.

In *Holiday v. Johnston*, 313 U. S. 342, 85 L. ed. 1392, it was contended that the petition for a writ insufficiently alleged a denial of the constitutional right to assistance of counsel. In reply to this contention, it was stated by this Court:

> "A petition for habeas corpus ought not to be scrutinized with technical nicety."

This would clearly seem to be true in the case of an application submitted by one who at the time of its submission had only the assistance of a fellow inmate. Any other attitude with respect to the technical sufficiency of such a pleading would not be consistent with the very right to liberty which the due process clause is designed to protect, in accordance with fundamental conceptions of fairness in our system of law.

It is true that the authorities cited above in connection with the argument concerning waiver of the right to assistance of counsel are cases in which the question of waiver arose in proceedings in federal courts. The opinion in *Evans v. Rives, supra*, analyzes closely the effect of the opinions in *Johnson v. Zerbst, supra*, and *Walker v. Johnston, supra*, upon the holdings of sixteen cases decided by federal courts in various circuits, and makes clear that in view of sound reasoning and the authority of *Johnson v. Zerbst, supra*, and *Walker v. Johnston, supra*, the basis for the decisions in the sixteen cases is not warranted. It is respectfully urged that the same reasoning set forth in *Johnson v. Zerbst, supra, Walker*

v. Johnston, supra, Glasser v. United States, supra, and *Evans v. Rives, supra,* applies with equal force and significance when the question of waiver arises in a criminal proceeding in a state court. Indeed in the opinion in *Glasser v. United States, supra,* the fundamental character of the right to assistance of counsel under the Sixth Amendment as a safeguard to human life and liberty is illustrated by the determination of the fundamental character of that right as protected in state courts under the due process clause of the Fourteenth Amendment.[11]

Whatever distinction may exist with respect to the "less rigid and more fluid"[12] concept of the due process of law clause in the Fourteenth Amendment, as distinguished from the provisions of the Fifth and Sixth Amendments, certainly the concept of waiver—"the intentional relinquishment of a known right or privilege"[13] —is the same, whether it is contended that the right to assistance of counsel is waived in a state court or in a federal court. In a state court as well as in a federal court, to arbitrarily hold that a guilty plea waives the right to assistance of counsel would make possible under

11 "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A. L. R. 527, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." *Glasser v. United States,* 315 U S. 60, 86 L. ed. 680.

12 This language is from *Betts v. Brady,* 216 U. S. 455, 86 L. ed. 1595

13 *This language is from Johnson v. Zerbst,* 304 U. S. 458, 82 L. Ed. 1461

the guise of waiver the most extenuating violation of fundamental rights of human life or liberty which the Fourteenth Amendment is designed to safeguard. In a state court as well as in a federal court to say that the right is waived by failure to make demand for counsel, in utter disregard of whether the accused even knew of the existence of the right, results unavoidably in making a mere sham of this fundamental right to be heard and to the assistance of counsel. In a state court as well as in a federal court, to accept anything less than an intelligent or intentional voluntary waiver of a known right to assistance of counsel will result in depriving an accused of the fundamental right to assistance of counsel in the very cases in which the accused is most in need of the protection of his fundamental human rights.

The Supreme Court of Nebraska in the instant case, in holding that the petitioner had waived his right to the assistance of counsel by pleading guilty and failing to request that counsel be assigned to him, relied upon two earlier opinions of the Supreme Court of Nebraska and one opinion of the Fourth Circuit Court of Appeals (R. 14). Like fifteen of the sixteen cases from federal courts in various circuits which are analyzed in *Evans v. Rives, supra*, the two Nebraska cases were decided prior to *Walker v. Johnston, supra*.[14] And the one federal case

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14 *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718, was decided March 8, 1940. Certiorari denied in United States Supreme Court October 21, 1940, 311 U. S. 682, 85 L. ed. 439; *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82, was decided March 22, 1940. Certiorari denied in United States Supreme Court, October 21, 1940, 311 U. S. 682, 85 L. ed. 440. *Walker v. Johnston*, 312 U. S. 275, 85 L. ed. 830, was argued January 15, 1941 and decided February 10, 1941. (The petitioner in *Walker v. Johnston*, however, pleaded guilty on April 28, 1936, while the petitioner, Richard Rice, in the instant case pleaded guilty on October 14, 1940 (R. 4).)

cited by the Supreme Court of Nebraska is *Cundiff v. Nicholson*, 107 Fed. 2d 162, decided prior to *Johnson v. Zerbst, supra*, and *Walker v. Johnston, supra*. The case of *Cundiff v. Nicholson, supra*, is one of the cases of which the Court of Appeals of the District of Columbia said, in *Evans v. Rives, supra:*

> "In view of the ruling in Johnson v. Zerbst, that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in loss of fundamental rights,' this basis of decision is not warranted."

And referring specifically to the opinion of the Fourth Circuit Court of Appeals in *Cundiff v. Nicholson, supra*, the Court of Appeals of the District of Columbia said, in *Evans v. Rives, supra:*

> "And the assumption that had counsel been appointed for the petitioner at the outset of the criminal proceeding they could honestly have entered no other plea than that which the petitioner himself, without benefit of counsel, had entered, is, we think, unwarranted and dangerous."

In addition, the Supreme Court of Nebraska relies upon two statements from the text of Corpus Juris and Corpus Juris Secundum[15] (R. 14). An examination of these texts shows that the authorities cited are cases decided prior to *Walker v. Johnston, supra*.

In considering the chronology of the opinions, however, it should be emphasized that the opinion in *Walker v. Johnston, supra*, was rendered February 10, 1941, two and a half years before the District Court of Lancaster

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15 16 C. J. 821 and 23 C. J. S. p. 314, Sec. 979.

County denied the petitioner's application in the instant case on August 11, 1943 (R. 8).

And in considering the application of the proposition that waiver will not be presumed from a guilty plea or from failure of the accused to demand counsel, as now established by *Johnson v. Zerbst, Walker v. Johnston,* and *Glasser v. United States, supra,* it is significant that neither the Nebraska Supreme Court, nor any of the authorities upon which it relied in the instant cases, suggested any distinction between the right of an accused in a state court as distinguished from a federal court.

In *Smith v. O'Grady,* 312 U. S. 329, 85 L. ed. 859, this Court had occasion to consider the practice prevailing in the Supreme Court of Nebraska in habeas corpus proceedings. In that case which was decided just one week after *Walker v. Johnston, supra,* and which case was cited in the opinion, there was a contention by the Attorney General that the petitioner under Nebraska law could not have his asserted rights determined in habeas corpus proceedings. Commenting on this contention, this Court said:

> "Moreover, while the opinions of the Nebraska courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus, the Nebraska Supreme Court has held that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights. Because of this, and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards

> commanded by the Federal Constitution, we are unable to reach the conclusion that habeas corpus is unavailable to him under Nebraska law."

In *Smith v. O'Grady, supra,* the application for the writ included allegations of a refusal of the petitioner's request for the assistance of counsel. As to the allegations of the petitioner, and the decision of the district court in Nebraska that the petition stated no cause of action, this Court said:

> "If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment. The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand."

Special significance attaches to the opinion in *Smith v. O'Grady, supra,* in connection with the right of the petitioner in the instant case, by reason of the observations of the Eighth Circuit Court of Appeals in the case of *Boyd v. O'Grady,* 121 Fed. 2d 146. In this case the accused had been arraigned and pleaded guilty in the District Court of Douglas County, Nebraska. He later filed a petition for a writ of habeas corpus in the District Court of the United States for the District of Nebraska, which included allegations that he had no means to hire a lawyer and did not know that he was entitled to the assistance of counsel. There were also allegations of coercion, and of a refusal to call a lawyer when requested after sentence had been imposed. The record showed that a petition for a writ of habeas corpus had pre-

viously been filed and dismissed in the District Court of Lancaster County, Nebraska. One of the objections filed in the federal district court by the warden of the penitentiary was that the petitioner had not exhausted his remedies in the state court and did not show peculiar urgency to justify the intervention of the federal court. The federal district court sustained the objection that the petition did not present a case where federal intervention was justified.

On the appeal to the Eighth Circuit Court of Appeals the petitioner contended at the time his petition was presented to the District Court of Lancaster County, in September, 1940, the practice of habeas corpus proceedings in Nebraska under the decisions of the Supreme Court of Nebraska was such that the appellant could not, as a practical matter, obtain a complete judicial hearing upon his claim that he had been wrongfully denied the assistance of counsel. He contended that any appeal to the Supreme Court of Nebraska would be unavailing because that court had repeatedly held that a waiver of the constitutional right of an accused to have counsel would be implied where an accused being without counsel, fails to demand that counsel be assigned him and pleads guilty. The cases referred to in the opinion of the Eighth Circuit Court of Appeals as illustrating the attitude of the Supreme Court of Nebraska are the same two cases which were relied on by the Supreme Court of Nebraska in its opinion in the instant case[16] (R. 14).

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16 *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718.
Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82.

The Eighth Circuit Court of Appeals in reversing the judgment and remanding the cause cited the cases of *Johnson v. Zerbst, supra.* And the Eighth Circuit Court of Appeals expressed the expectation that Nebraska procedure in habeas corpus would be conformed to the pronouncements of the Supreme Court of the United States. In fact, however, Nebraska procedure has not been conformed to the pronouncements of the Supreme Court of the United States, particularly with respect to the implication of waiver of the right to the assistance of counsel from a plea of guilty, as is illustrated by the opinion of the Supreme Court of Nebraska in the instant case (R. 14).

The non-conformity of Nebraska procedure with the pronouncements of the Supreme Court of the United States is made clear by the following language in *Boyd v. O'Grady, supra:*

> "We think it must be inferred from the decisions of the Supreme Court of Nebraska in Alexander v. O'Grady and Davis v. O'Grady, supra, and from the action of the Supreme Court of the State in Smith v. O'Grady, supra, and from the state court's summary denial of the petition for habeas corpus in this case, that at least up to the time of the decision in Smith v. O'Grady in February of this year, the Nebraska courts when considering petitions for habeas corpus did not give to the Nebraska statute requiring assignment of counsel to one accused of a penitentiary offense the same effect as the federal courts are required to give to the assistance of counsel clause of the Sixth Amendment in habeas corpus cases before them. It is at best doubtful whether the Nebraska courts would, before Smith v. O'Grady, supra, have granted ha-

beas corpus to a person sentenced on a plea of guilty but without counsel upon proof aliunde that the waiver of counsel, implied by the plea, had not been intelligently and completely made, and it is made clear in Smith v. O'Grady, supra, that the procedural guarantee of the Sixth Amendment to the federal constitution is protected against State invasion through the Fourteenth Amendment.

"It follows that this petition for habeas corpus presented to the federal judge the rare case and peculiar urgency where the petitioner had no fair prospect of securing full and complete protection of the rights guaranteed by the federal constitution through habeas corpus proceedings in the State courts, even by appeal to the court of last resort in the State. He had been confined in the jail and penitentiary more than twenty months upon a sentence of twenty-nine months (allowing for good time) and could not hope for relief by the process of appeal through the State Supreme Court to the United States Supreme Court within the period of the sentence. Although the Nebraska procedure in habeas corpus will doubtless be conformed to the pronouncement of the Supreme Court in Smith v. O'Grady, supra, it had not been at the time this petition for the writ was presented, and we think the federal judge ought not to have declined to consider it. It states a cause of action and the evidence should be heard."

It would seem also that the language quoted above has special significance in showing that Nebraska procedure does not conform to the pronouncements of this Court in view of the fact that two of the three Circuit Judges before whom the case of *Boyd v. O'Grady, supra,* was heard are eminent members of the Nebraska bar. The opinion was written by Honorable Joseph W. Woodrough, who for many years was a Judge of the District

Court of the United States for the District of Nebraska. Also a member of the Eighth Circuit Court of Appeals hearing the case of *Boyd v. O'Grady, supra,* was Honorable Harvey M. Johnsen, who was a Justice of the Supreme Court of Nebraska at the time the cases were submitted and the opinions rendered in *Alexander v. O'Grady,* 137 Neb. 645, 290 N. W. 718, and *Davis v. O'Grady,* 137 Neb. 708, 291 N. W. 82.

That the procedure in Nebraska at the present time does not conform to the pronouncements of the Supreme Court of the United States with respect to waiver of the right of assistance of counsel is shown by the dictum in the recent case of *Ex parte Tail,* 16 N. W. 2d 161, decided October 20, 1944, the opinion in which case again states that a waiver will be implied where an accused fails to demand that counsel be assigned him, citing *Alexander v. O'Grady, supra, Davis v. O'Grady, supra,* and also the opinion of the Supreme Court of Nebraska in the instant case. In the case of *Ex parte Tail,* however, it appeared from the journal of the judgment of the District Court that counsel had in fact been appointed.

In concluding this portion of the argument it is appropriate to call attention also to two other cases involving habeas corpus very recently decided by the Supreme Court of Nebraska, namely, *Williams v. Olson,* 16 N. W. 2d 178, and *Hawk v. Olson,* 16 N. W. 2d 181, both decided November 3, 1944. In *Hawk v. Olson, supra,* the Supreme Court of Nebraska found that many of the petitioner's grounds for release were pleaded in the form of conclusions, and in both *Hawk v. Olson, supra,* and *Ex parte Tail, supra,* the Supreme Court of Nebraska ap-

parently declined to consider statements of conclusions. The case of *Williams v. Olson, supra,* involved a question of the application of the doctrine of res judicata to habeas corpus proceedings, holding that the principle of res judicata applies in cases of habeas corpus where there had been a hearing upon the merits in a former action of the same kind, and where in a second petition filed for a writ of habeas corpus it affirmatively appears that such petition is based upon the same reasoning and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.[17]

The tendency to apply strict rules of pleading, which is suggested in *Ex parte Tail, supra,* and at the same time to deny a later application for a writ of habeas corpus, which may not contain a new state of facts, on grounds of res judicata, presents a situation whereby one who is imprisoned risks his assertion of fundamental rights upon one petition for a writ which he, being imprisoned, is not always in a position to have prepared by most expert counsel.

While it does not appear in the instant case that there was any hearing on the similar petition, previously filed and dismissed in the District Court of Lancaster County, the attitude of the Supreme Court of Nebraska with respect to habeas corpus proceedings as illustrated by its various decisions, including the three cases last

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17 In the case of *Waley v. Johnston*, 316 U. S. 101, 86 L. ed. 1302, it was stated: "The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner." However, in that case it appeared that there was no hearing on the allegations of an earlier application for a writ of coram nobis.

above cited, has prompted the petitioner, Richard Rice, in the instant case to urge upon his counsel appointed by the Supreme Court of the United States, that the Supreme Court of the United States should issue the writ of habeas corpus in the instant case, for the reason that it would be a useless formality to remand the case to the courts of Nebraska, in view of their decisions.

It is in fact the attitude of the petitioner himself in the instant case that, within the language of *Smith v. O'Grady, supra,* Nebraska provides no judicial remedy whatsoever for the petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the Federal Constitution. While this Court said in *Smith v. O'Grady, supra,* that it was "unable to reach the conclusion that habeas corpus is unavailable" under Nebraska law, counsel appointed for the petitioner in this case desires to make it unequivocally plain that one of the contentions of the petitioner himself is that the decisions of the Supreme Court of Nebraska in habeas corpus cases have resulted in a situation wherein this petitioner is wholly without any available remedy in a Nebraska court for the protection of his rights under the Federal Constitution. In the instant case it must be remembered that no pleading was filed on behalf of the Attorney General, and that the conclusions reached by both the District Court of Lancaster County and the Supreme Court of Nebraska were based upon the allegations of the plaintiff's petition as uncontroverted in the record. It is suggested, therefore, that it is a fair inference that the sole question presented is the sufficiency of the allegations, and that, if held to be sufficient, the writ should be issued forthwith.

Taking into account that this petitioner is a ward of the Federal Government, and the further circumstance that it appears from the record that he is imprisoned under a sentence for a crime for which under the Federal Penal Code he is subject to trial and penalty under the exclusive jurisdiction of the United States, it is respectfully urged that the case here presented is one wherein this petitioner's constitutional rights should properly be finally determined in the Supreme Court of the United States in this present proceeding.

II.

THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED BECAUSE THE STATE COURT HAD NO JURISDICTION TO PROCEED TO JUDGMENT AGAINST THE PETITIONER.

An Indian committing the crime of burglary on an Indian Reservation is subject to trial exclusively in the federal courts.

The petitioner's application for a writ alleged that he is a Winnebago Indian by birth a resident of Winnebago, Nebraska, a Ward of the Federal Government (R. 2); that he is an Indian of the Winnebago Tribe located in the State of Nebraska, Thurston County, Nebraska (R. 6); that the alleged crime was committed on "an indian Reservation Government property" without and beyond the Jurisdiction of the Trial Court (R. 5). The information charged that the petitioner with one Joe Bigbear did feloniously and forcefully break and enter into a certain dining hall in the Village of Winnebago in Thurston County, Nebraska, and that said dining hall is owned by the Winnebago Indian Mission of the Reform Church

in America, with the intent to steal property of the "valuse" contained in said building (R. 3). The Journal Entry of the District Court of Thurston County, Nebraska, stated that the petitioner was "arraigned upon the information filed herein for burglary" (R. 4).

By reason of these circumstances, the petitioner contends that he has been deprived of his constitutional rights, in that there was no jurisdiction in the state courts of Nebraska to try and convict him for the crime of burglary.

Section 328 of the Criminal Code of the United States, (being Title 18 U. S. C. A. section 548) provides as follows:

> "All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within any Indian reservation under the jurisdiction of the United States Government, including rights-of-way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons *committing any of the above crimes within the exclusive jurisdiction of the United States* * * * ". (Italics supplied.)

It is true that the record is silent as to the genealogy of the petitioner and also as to any more definite legal description of the place of the crime than as above set forth. It is, however, common knowledge in Nebraska that the Winnebago Indian Reservation is located in Thurston County, and that the office of the Indian

Agency is located at or close to the Village of Winnebago. In fact all of Thurston County is included within either the Omaha Reservation or the Winnebago Reservation.— The boundaries of Thurston County as defined in Section 25-191 of the 1929 Compiled Statutes of Nebraska[18] disclose this fact. And the statutory boundaries of Dakota County, Nebraska, immediately adjacent to Thurston County on the North, which are described in Section 25-124[19] of the 1929 Compiled Statutes of Nebraska also make reference to the North line of the Winnebago Indian Reservation as being the North line of Thurston County; and the statutory boundaries of Burt County, Nebraska, which is adjacent to Thurston County on the south, which boundaries are described in Section 25-113[20] of the 1929 Compiled Statutes of Nebraska, refer to the South boundary of The Omaha Indian Reservation. Historically, the Winnebago Reservation was established by a treaty dated March 6, 1865, by which the leading men of the Omaha Tribe of Indians, already located on the present Omaha Reservation, agreed to sell part of their reservation to the United States in order that a Reservation for the Winnebagos might then be created, and the Winnebagos have a heritage and home upon soil of their own.[21]

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18 The provisions of the statute are set forth in the Appendix to this Brief, together with reference to various treaties with the Omaha and Winnebago Tribes.

19 The section is set forth in full in the Appendix.

20 The section is set forth in full in the Appendix.

21 Vol. 1, History of Nebraska, pages 113-122, by Addison Erwin Sheldon, Ph.D., who is also Author of Articles on Nebraska in the Encyclopaedia Britannica. See also reference to the treaties in the Appendix to this brief.

Further, the Supreme Court of Nebraska did not base its decision with respect to the question of jurisdiction on any doubt as to the facts as alleged, but replied to the contention of the petitioner that he should have been tried under the exclusive jurisdiction of the Federal Government, with the following language:

> "It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the District Court of Nebraska. However, Chapter 15, Title 18, U. S. C. A., Sec. 548, of the Federal Penal Code, provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons." (R. 13, 14.)

The opinion of the Supreme Court of Nebraska in referring to Section 548 omits the language "committing any of the above crimes within the exclusive jurisdiction of the United States." These are the words italicized in the quotation of the statute above. The omission of these words in the paraphrasing of the statute by the Supreme Court of Nebraska completely alters the meaning thereof. The federal statute provides that Indians committing the designated crimes within the limits of an Indian reservation and within the boundaries of a state shall be tried in the same courts and in the same manner as all other persons committing such crimes within the exclusive jurisdiction of the United States. The limitation of the words "committing any of the above crimes within the exclusive jurisdiction of the United States" cannot be disregarded without completely changing the obvious meaning of the statute. With reference to the

designated crimes, when committed by Indians on Indian reservations the statute clearly does not provide that the Indian shall be tried in the same courts as all other persons, which is the Supreme Court of Nebraska's interpretation of the statute, but rather the statute provides that Indians under such circumstances shall be tried in the same courts as all other persons who are within the exclusive jurisdiction of the United States.

In the recent case of Ex parte Tail, *Tail v. Olson*, 16 N. W. 2d. 161, decided by the Supreme Court on October 20, 1944, in which the Supreme Court of Nebraska affirmed the judgment denying an application for a writ of habeas corpus by a prisoner serving a sentence for second degree murder, the Supreme Court of Nebraska reiterated its interpretation of the statutory provision quoted above, saying:

> "However, Chapter 15, Title 18, U. S. C. A. Section 548 of the federal penal code vests such jurisdiction in the state courts. See in re Application of Rice (Rice v. Olson), 144 Neb. ——, 14 N. W. 2d. 850."

The statute above quoted has been the subject of construction on several occasions in this Court. An early construction is in *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228. As originally enacted the section of the statute above quoted contained two distinct definitions of the conditions under which Indians may be punished for the designated crimes. The first sentence of the section concerned offenses committed within the limits of a territorial government. The second sentence of the section concerned offenses committed within the limits of a state. The second sentence was amended in 1932 to include the

words "including rights-of-way running through the reservation," but otherwise remains unchanged from the language as discussed in *United States v. Kagama, supra.* Referring to offenses committed within the limits of a State, this Court said, in *United States v. Kagama, supra*:

> "The second is where the offense is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian Reservation. In this case, of which the State and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian Reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians, guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offenses by Indians which are committed within the limits of a State and the limits of a Reservation, subjects the offenders to the laws of the United States, passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States."

With reference to the ability of Congress to provide for the trial of Indians charged with committing the designated crimes on Indian Reservations within states, it is stated in the opinion in *United States v. Kagama, supra*:

> "The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. The Congress *has* done this, and *can*

do it, with respect to all offenses relating to matters to which federal authority extends."

Clearly this Court in *United States v. Kagama, supra*, was not discussing a statute which, in the language of the Supreme Court of Nebraska, "provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a State, shall be subject to the same laws and tried in the same courts, and subject to the same penalties as all other persons."

Prior to the instant case, the Supreme Court of Nebraska did not construe that section of the Federal Penal Code as providing that all Indians committing a crime within or without an Indian reservation might be subject to the jurisdiction of the state courts. In *Kitto v. State* 98 Neb. 164, 152 N. W. 380, the Supreme Court of Nebraska held that a Santee Sioux Indian was properly convicted in a state court of an assault on another Indian within an Indian reservation. Assault is not one of the crimes designated in the section. In that case the defendant was contending that the offense was within the exclusive jurisdiction of the courts of the United States. In holding that the state court had jurisdiction, the Supreme Court of Nebraska said, referring to the section of the statute quoted above:

> "That the United States government has full and absolute control of its territories, reservations, and Indian wards cannot be questioned. If, therefore, the offense with which the defendant stands charged is one which Congress has reserved to the United States government the right to punish, and the jurisdiction over which it has reserved to the federal courts, then the district court was without jurisdiction. Otherwise its jurisdiction must be upheld."

Of special interest in connection with the case of *United States v. Kagama* is the opinion of the Supreme Court of Nebraska in *Ex parte Cross*, 20 Neb. 417, 30 N. W. 428. This was a petition for a writ of habeas corpus by a Winnebago Indian who had been accused of stealing a horse. The petition alleged that the alleged crime was committed on the reservation. A general demurrer was filed to the petition.

The Supreme Court of Nebraska entered judgment striking the case from the docket, with the following comment:

> "The case was presented by counsel, who had given the subject careful attention, and who displayed quite a considerable degree of ability in the argument, and in the preparation of briefs. But soon after the submission it was made known to the court that the restraint had been removed, and the petitioner was no longer held a prisoner, and the further consideration of the case was abandoned, the cause still remaining on the docket. Since the question here involved has been decided by the supreme court of the United States in an opinion written by Judge Miller, of that court, and filed on the tenth day of May, 1886, we deem it proper to refer to that decision as being the holding of the court of last resort, and possessing appellate jurisdiction over this court upon the question presented, and thus dispose of the case. See United States v. Kagama, 6 Sup. Ct. Rep. 1109. In that case it was held that the state courts have no jurisdiction over the Indians within the state, and on their reservations, for crimes committed by and against each other, so long as they maintain their tribal relations. It is true that the decision is based upon an act of congress passed after the arrest of the petitioner, and therefore might not be decisive of the question involved in this case, did one

> exist, yet as it declares the law as it is and has been since the taking effect of the act, to-wit, March 3, 1885, and is now, by the terms of the act and the construction given it by the highest court of the nation, the law of the land, we acknowledge its authority. We also fully approve of the reasoning of the learned judge who wrote the opinion."

In *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, the Supreme Court of Minnesota held that Indians committing the crimes designated in the statute above quoted were not subject to the criminal laws of the state, saying:

> "By the act of 1885, presumably, congress has enumerated all the acts which in their judgment ought to be made crimes when committed by Indians, in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to abrogate the guardianship over these Indians which is exclusively vested in the general government."

In *People v. Daly*, 212 N. Y. 183, 105 N. E. 1048, the New York Court of Appeals considered a petition for a writ of habeas corpus by an Indian who was being held in the county jail of Niagara County to await action of the grand jury on a charge of assault with intent to kill, committed within the boundaries of the reservation of the Tuscarora Tribe. The petitioner contended that he was subject to trial only in a United States court. The New York Court of Appeals, in holding that the jurisdiction of the state court must give way before the higher authority which the statute above quoted vests in the federal court, said:

> "The statute confers upon the federal courts jurisdiction of the enumerated crimes committed by an Indian 'within the boundaries of any state of the United States, and within the limits of *any* Indian reservation.' We are not at liberty to limit this broad language, unless we find somewhere in the statute or its history the indication of an intent that it should be limited, and we have found none."

In some of the cases involving the statutory provision above quoted, other circumstances have been urged as affecting the exclusive jurisdiction of the federal courts, but the authorities have consistently held that an Indian committing one of the designated crimes on an Indian reservation is subject exclusively to the jurisdiction of the federal courts.

Thus in *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, where both the defendant and the woman whom he was accused of murdering held patents from the United States and it was claimed that they were citizens of the United States, this Court said:

> "But, although made a citizen of the United States and of the state, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation."

In *State v. Columbia George*, 39 Ore. 127, 65 Pac. 604, where the defendant had been convicted of murder in the Circuit Court of Oregon, and was an allottee of land on the United States Indian Reservation in Umatilla County, Oregon, the Supreme Court of Oregon in reversing the judgment and remanding the cause with directions to discharge the defendant, because of lack of jurisdiction in the state court, said:

"The state courts have never had jurisdiction over the Indians within the Indian country or upon Indian reservations, except as and insofar as the general government has relinquished the supervisory control and authority over them. The acts under consideration are not indicative of such a purpose; hence it follows that the state court is without jurisdiction of the offense charged."

This opinion of the Supreme Court of Oregon was commended by Mr. Chief Justice Fuller in *Toy Toy v. Hopkins*, 212 U. S. 542, 53 L. ed. 644, where, in an appeal from a conviction in federal court, in connection with the same circumstances, this Court reached the same conclusion with respect to the exclusive jurisdiction of federal courts.

In the opinion in *State v. Columbia George, supra*, there is quoted an opinion of the Federal Circuit Court of Nebraska, in the case of *United States v. Flournoy Live-Stock & Real-Estate Co.*, 71 Fed. 576, where the following significant statement is made with particular reference to the Omaha and Winnebago Reservations in Nebraska:

"I further hold that these reservations continue to be Indian reservations; that the United States has never yet been released from the treaty stipulations and obligations by which it assumed to preserve these lands for the use and benefit of the Indians; that the United States holds the title of these lands charged with the trust created by the treaties in question, and it is its duty to do whatever is necessary to protect the Indians in the proper use and occupancy thereof; that the power and right in the United States to do whatever is necessary for the fulfilment of its treaty duties, trusts and obli-

gations towards the Indians rests upon every foot of soil and upon every individual within the boundaries of the reservations, and this power and right is paramount and supreme."

Again, in *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276, the question was whether a murder committed by an Indian on a section numbered 16, a school land section, on an Indian reservation in Wisconsin, was subject to the exclusive jurisdiction of the United States. And this Court, in holding that the federal court had jurisdiction, said:

> "But independently of any question of title, we think the court below had jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States sets apart any land of their own as an Indian reservation, whether within a state or territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations."

In considering these authorities, the following observation of the Supreme Court of Nebraska in *Wollmer v. Wood*, 119 Neb. 248, 228 N. W. 541, in a case involving a mortgage foreclosure and title to real estate, is significant:

> "As a necessary rule of construction it may also be said: 'From the time of Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, down to United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, it has been the rule of all courts to construe doubtful legislation in favor of the Indian.' Rider v. La-Clair, 77 Wash. 488, 138 P. 3, 4."

It is in contradiction to these authorities set forth above that the Attorney General argued in his brief before the Supreme Court of Nebraska in the instant case, that:

> "Even if he had tribal status or was an allottee of federal lands the crime of burglary of which he stood charged is specifically included as a crime punishable by our state courts", (referring to the section of the statute quoted at the beginning of this portion of the argument).

And the holding by the Supreme Court of Nebraska in the instant case, that the Federal Penal Code provides generally that all Indians committing a crime either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons (R. 13, 14), seems also to be in direct conflict with the authorities above cited.

The petitioner in the instant case was sentenced on October 14, 1940 for a period of from one to seven years at hard labor in the penitentiary of the State of Nebraska (R. 4, 5). The record shows tha. for more than two years, he has consistently tried to assert his alleged constitutional rights. If he was in fact subject to trial exclusively in a federal court, there would seem to be no question but that he is entitled to the constitutional rights specially safeguarded in the United States Constitution for those brought to trial in federal courts, and would not, therefore, be in the position of raising questions of his constitutional rights only under those provisions of the United States Constitution which safeguard rights in state courts. The record shows that he

did not have the assistance of counsel whereby he might have presented the contention that he was subject exclusively to the jurisdiction of a federal court. In the face of these circumstances, and the argument above, it is little wonder that this petitioner himself has vigorously urged upon his appointed counsel that the substance of the matter to be determined is whether or not the petitioner is left remediless in the state courts of Nebraska, and that it is incumbent upon the Supreme Court of the United States to issue the writ of habeas corpus, for the reason that it would be a useless formality to remand the case to the courts of Nebraska.

The prayer of the petitioner's petition for writ of certiorari respectfully asks that this Honorable Court issue a writ of certiorari to review the order, judgment and opinion of the Supreme Court of Nebraska, that its judgment be reversed, and that the prayer for a petition for writ of habeas corpus be sustained. As counsel appointed by this Court, after the filing of the petition for writ of certiorari and brief in support thereof, we cannot emphasize too strongly the position of the petitioner, as communicated to his appointed counsel, that he seeks in this case to have the judgment of the Supreme Court of Nebraska reversed, and that the Supreme Court of the United States issue the writ of habeas corpus.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Supreme Court of Nebraska be reversed, and that the prayer of the petitioner

for a writ of habeas corpus, in protection of his fundamental rights under the Federal Constitution, be granted.

BARTON H. KUHNS,

Counsel for Richard Rice, Petitioner.

January, 1945.

APPENDIX

Section 25-191 of the 1929 Compiled Statutes of Nebraska defines the boundaries of Thurston County as follows:

"The territory bounded as follows shall constitute the county of Thurston: Commencing at a point where the west boundary of the Omaha Indian reservation intersects the south line of section thirty-three, (33) township twenty-five, (25) north, of range five, (5) east, 6th principal meridian; thence east to the northeast corner of township twenty-four, (24), north, of range seven (7) east; thence south to the south line of the Omaha Indian reservation as originally surveyed; thence east along said line to the line between sections thirty-two and thirty-three, township twenty-four (24) north, of range ten (10) east; thence north to the northwest corner of section twenty-one (21), township twenty-four, (24) north, of range ten (10) east; thence east to the eastern boundary of the State of Nebraska; thence in a northwesterly direction along said boundary line to its intersection with the north line of the Winnebago Indian reservation, township twenty-seven (27) north, of range nine, (9) east; thence west along the north line of said reservation to the intersection of the line between sections thirty-three and thirty-four, township twenty-seven (27) north, range six (6) east; thence south to the south-west corner of section thirty-four, (34) township twenty-seven, (27) north, range six (6) east; thence west to an intersection with the west boundary of said Winnebago Indian reservation; thence south along the Winnebago and Omaha Indian reservation line to the place of beginning."

Section 25-124 of the 1929 Compiled Statutes of Nebraska defines the boundaries of Dakota County as follows:

"The county of Dakota shall for all purposes be composed of the territory contained within the following boundaries, to-wit: Commencing at the most westerly point where the township line between townships twenty-nine, and thirty, north, intersects the state boundary line; thence west along said line to the northwest corner of section three, in township twenty-nine, north, of range six, east; thence south by section lines to the north line of the old Winnebago Indian reservation, now the north line of Thurston county; thence east along the north line of said Indian reservation, and the north line of Thurston county, to the state boundary line in the channel of the Missouri river; thence northerly along said state boundary line to the point where said boundary line is intersected by the east boundary line of the State of South Dakota; thence westerly along the middle of the main channel of the Missouri river as agreed upon as the boundary line between the States of Nebraska and South Dakota by the boundary commissions of said states provided for by the legislatures thereof during the sessions of 1903, and as shown by the reports of said commissions now on file, and approved by the legislatures of 1905, to the place of beginning, excluding from said county of Dakota, all that territory formerly within said county, which by said commissioners and their said report is given to the State of South Dakota and specially including within Dakota county all the territory which was formerly South Dakota, which by said commissioners and their said reports is given to the State of Nebraska."

Section 25-113 of the 1929 Compiled Statutes of Nebraska defines the boundaries of Burt County as follows:

"The territory bounded as follows: Commencing at a point where the north line of sections twenty-

one, twenty-two, twenty-three, and twenty-four, of township twenty-four, north, of range ten, east of sixth principal meridian intersects the east boundary line of the State of Nebraska; thence west along said section lines to the northwest corner of said section twenty-one; thence south along the west line of said sections twenty-one and twenty-eight to the south boundary line of Omaha Indian reservation; thence west on the south boundary line of said reservation to the line dividing ranges seven and eight east; thence south by said line to the south line of township twenty-one, north, of range eight, east; thence east by said line to the northeast corner of section six, in township twenty, north, of range nine, east; thence south by section lines one mile east of the guide meridian to the southwest corner of section twenty, in township twenty, north, of range nine, east; thence east by section lines to the state boundary; hence northwardly up said boundary to the place of beginning, shall constitute the county of Burt."

By a treaty of March 16, 1854, found in 10 United States Statutes at Large, 1043, between the United States of America and the Omaha Tribe of Indians, the Omaha Tribe ceded to the United States all their lands west of the Missouri River and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River "disembogues" out of the bluffs, to the western boundary of the Omaha country. This treaty reserved to the Omaha Tribe of Indians the land north of that which was ceded, and to which they agreed to move within the period of a year.

APPENDIX (Continued)

In 12 United States Statutes at Large, page 658, is an Act for Removal of the Winnebago Indians, and for the sale of their Reservation in Minnesota for their Benefit, which was approved February 21, 1863.

In 14 United States Statutes at Large, page 667, is the treaty between the United States of America and the Omaha Tribe of Indians, whereby the United States purchased from the Omaha Tribe of Indians a portion of the Omaha Reservation, which later became the Winnebago Reservation. In this treaty the portion purchased is described as:

> "Commencing at a point on the Missouri River four miles due south from the north boundary of the present Omaha Reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the Reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the River to the place of beginning."

This treaty was concluded March 6, 1865, ratification was advised February 15, 1866.

In 14 United States Statutes at Large, page 671, is the treaty between the United States of America and the Winnebago Tribe of Indians, whereby the land purchased from the Omaha Tribe became the Winnebago Reservation. This treaty was concluded March 8, 1865, ratification was advised with amendment on February 13, 1866, the amendment was accepted on February 20, 1866, and the treaty was proclaimed on March 28, 1866. (The amendment provided that the Winnebago Indians should

receive 400 horses instead of 60 horses as provided in the original treaty.)

All of the above treaties and the statutory provision with respect to the removal of the Winnebago Indians from Minnesota were, of course, dated prior to the admission of Nebraska as one of the United States of America in 1867.

Regardless, therefore, of any question as to the exact title of the particular property on which the alleged crime was committed, and which is described in the application for the writ of habeas corpus as "indian" Reservation Government property (R. 5), there can be no question as to the fact that the alleged crime was committed within the boundaries of the Winnebago Indian Reservation, and, therefore, under the authorities cited in the brief, the alleged crime was under the exclusive jurisdiction of the United States.